

Defendant's Exhibit 51

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No. 18-md-02843-VC-JSC

This document relates to:

ALL ACTIONS

**PLAINTIFFS' RESPONSE TO
FACEBOOK'S MOTION FOR
RECONSIDERATION OF THE SPECIAL
MASTER'S SUPPLEMENTAL ADI
ORDER**

Judge: Hon. Vince Chhabra
Hon. Jacqueline Scott Corley
Special Master Daniel Garrie
Courtroom: 4, 17th Floor

JAMS Ref. No.: 1200058674

ORAL ARGUMENT REQUESTED

1 In its motion for reconsideration, Facebook raises objections that either lack merit or have
 2 been addressed by the Special Master’s tentative amended supplemental order on ADI. Plaintiffs
 3 will briefly respond to the objections that lack merit.

4 **1. The Special Master’s finding of relevance.** Facebook complains about the Special
 5 Master’s finding that “a substantial number of documents” he reviewed in camera “are relevant to
 6 this case and not protected by privilege.” Tentative Am. Suppl. ADI Order ¶ 19. According to
 7 Facebook, this finding contradicts comments that Judge Corley made in a hearing. There is no
 8 contradiction. Judge Corley’s informal comments came after her review of twenty documents
 9 related to ADI—a sample that was not necessarily representative. The Special Master’s formal
 10 finding came after a review of “a substantial portion of the 6,000+ documents pertaining to the
 11 six exemplar apps.” *Id.*

12 **2. The supposed need for “document by document” review.** Facebook claims that the
 13 Special Master’s supplemental order cannot stand because determinations of privilege must be
 14 made on a “document by document” basis. This assertion gets the law wrong. Courts routinely
 15 make “bulk” determinations of privilege. *See, e.g., United States v. Richey*, 632 F.3d 559, 568
 16 (9th Cir. 2011) (holding that documents in an “appraisal work file” were not protected by the
 17 work-product doctrine); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 244 (N.D. Cal. 1990)
 18 (rejecting privilege claim and ordering production of “all communications” in a category); *see*
 19 *also Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 601 n.4 (5th Cir. 2021) (concerns
 20 about privilege did not “entail reviewing each and every document,” because the magistrate judge
 21 could issue “recommendations or rulings based on categories of documents”).

22 **3. Facebook’s self-inflicted time crunch.** Facebook protests that review and production
 23 of the documents covered by the supplemental ADI order will take too long, given existing
 24 discovery deadlines. This, however, is a problem of Facebook’s own making. Facebook knew by
 25 *at least* early 2020 that the ADI would likely become the subject of discovery. It could have
 26 begun its review of documents far sooner. Indeed, guidance provided by Judge Corley in April
 27 2021 alerted Facebook to the strong possibility that its objections to producing ADI were not

likely to be successful. *See* Hr’g Tr. at 16-17 (Apr. 4, 2021) (expressing view that work product privilege does not apply). Any plausible basis for the belief that Facebook could avoid ADI production was eliminated by Judge Corley’s September 8, 2021 Order overruling Facebook’s objections and ordering the parties to work with the Special Master to produce other documents “consistent with the guidance” in the Order. Facebook’s own delay cannot justify incomplete production. *See Sentry Ins. A Mut. Co. v. Brand Mgmt. Inc.*, No. 10-CV-347 ENV, 2012 WL 6617357, at *7 (E.D.N.Y. Dec. 19, 2012) (“Defendants’ attempts to penalize Sentry for defendants’ own discovery delays are unavailing.”); *City of St. Petersburg v. Total Containment, Inc.*, No. 06-20953CIV, 2008 WL 1995298, at *4 (E.D. Pa. May 5, 2008) (“Any further delay in completion of discovery in the underlying action is a result of PolyFlow’s own efforts to slow or prevent the production of the subpoenaed documents, and cannot justify denying the plaintiffs access to these materials.”); The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 159 (2017) (“Principle 3: Undue burden, expense, or delay resulting from a party’s action or inaction should be weighed against that party.”).

4. Proportionality. Facebook suggests that the Special Master’s amended supplemental order is not proportionate to the needs of the case. Facebook is incorrect. The fourth category of misconduct that Judge Chhabria recognized in his order on the motion to dismiss was Facebook’s failure to properly enforce its policy prohibiting third-party apps from using information about Facebook users for any purpose other than enhancing the interaction between the apps and the user. PTO No. 20 at 9-10, ECF No. 298. Such data misuse by third parties was precisely the focus of the ADI. The ADI—including internal contemporaneous communications about the ADI and is findings—is thus centrally relevant to this case. *See* Order Re: Facebook’s Appeal of Special Master’s Order Regarding ADI Materials at 4, ECF No. 806 (“Determining relevance is a key component of determining proportionality.”).

The Special Master’s tentative amended supplemental order on ADI is proper and sufficiently responds to Facebook’s objections. No further reconsideration is needed.

1 Dated: January 24, 2022

Respectfully submitted,

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